Supreme Court, U.S.
FILED
SEP. 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALUMINA PARTNERS OF JAMAICA,
Petitioner,

v.

CABLE BELT CONVEYORS, INC.,
AND
PAUL N. HOWARD COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

---

PETITIONER'S REPLY BRIEF

A. RAYMOND RANDOLPH
(Counsel of Record)
DANIEL I. PRYWES
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for Alumina Partners of Jamaica

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
ARGUMENT 1
CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) 3, 4

County of Sullivan v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977)..... 4

Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 5

Del E. Webb Construction v. *Richardson Hospital Authority*, No. 86-1570 (5th Cir., decided August 3, 1987)..... 3

In re Vigo Steamship, 26 N.Y.2d 157, 257 N.E.2d 624, *cert. denied*, 400 U.S. 819 (1970)..... 4

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)..... 5

Southland Corp. v. *Keating*, 465 U.S. 1 (1984)..... 5

Weyerhaeuser Co. v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984)... 3

STATUTES:

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*..... 1

LEGISLATIVE HISTORY:

Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. (1924) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-228

ALUMINA PARTNERS OF JAMAICA,
Petitioner,

v.

CABLE BELT CONVEYORS, INC.,
AND
PAUL N. HOWARD COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

---

PETITIONER'S REPLY BRIEF

In its opening brief, Alumina Partners of Jamaica ("Aluminia") urged the Court to review this case because it presents an issue of federal law on which there is a direct split among three circuits and confusion among the state courts. That issue is whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, empowers courts to consolidate separate arbitration proceedings in the absence of the parties' consent.

1. Respondents seek to avoid confronting the question presented here because, in their view, this case "*can*

be resolved as a routine matter of contract construction" (Resp. Br., at 5) (emphasis added). That, however, was not the view of the courts below, which based their decisions entirely on the legal conclusion that the courts have authority under the Federal Arbitration Act to compel consolidation when the parties' contracts do not expressly provide for consolidation.[1] It is this purely legal determination that Alumina seeks to have this Court review.[2]

2. There is nothing to respondents' further suggestion that no conflict on this legal issue exists between the Second Circuit on the one hand, and the Fifth and Ninth Circuits on the other. To be sure, each of these courts of appeals first properly considered whether the parties had contractually addressed the consolidation issue. But that has nothing to do with whether the courts disagree—as

---

[1] The district court's decision, affirmed in a terse opinion by the court of appeals ordering consolidation, was founded on the proposition that consolidation is "proper where there are common questions of law or fact and a possibility of conflicting awards or inconsistent results" (App. 9a).

[2] In any event, there is nothing to respondents' claim that Alumina affirmatively agreed to participate in consolidated arbitration proceedings with subcontractors (Resp. Br., at 3). The contract language relied on by the respondents (Resp. Br., at 2) applied *only* to the arbitration of disputes between Alumina and the contractor. Elsewhere in the contract, the parties expressly precluded "any contractual relationship between [Alumina] and any Subcontractor." (*See* Alumina Pet., at 3 n.1.) Thus, the general contractor, under the contract, could not bind Alumina to any agreement between the general contractor and subcontractor.

Moreover, the contract specifically provided that the parties would be governed by the rules of the American Arbitration Association, which took the position that "in the absence of the consent of Alumina Partners of Jamaica, the Association is without authority to consolidate . . . ." Jt. App. filed with Court of Appeals, at A238.

they do—about the legal issue presented when they determine that the parties have not agreed to consolidation. The split in authority among the circuits arises because some judges insert into the contracts consolidation provisions that parties did not agree upon and do so on the basis of the Federal Arbitration Act, despite the fact that Congress gave the courts no such power.

In this case and in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), the Second Circuit held that consolidation may be ordered even in the absence of affirmative consent, while the Ninth Circuit disagreed in *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).[3] In *Del E. Webb Construction* v. *Richardson Hospital Authority*, No. 86-1570 (5th Cir. Aug. 3, 1987), the Fifth Circuit considered both views and "agree[d] with the Ninth Circuit that under § 4 of the Federal Arbitration Act the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration." That is as clear a conflict on the law as can be imagined.

3. Respondents also argue that this case does not present a "significant issue of substantive law" because in the future parties may guard against what petitioner believes is judicial overreaching by inserting explicit provisions in their contracts flatly prohibiting consolidation. (Resp. Br., at 6, 8.) But the federal and state courts

---

[3] In *Weyerhaeuser*, the court held that "[i]nsofar as [*Nereus*] holds that federal courts may order consolidation in the absence of consent, we decline to follow it." 743 F.2d at 637. The respondents necessarily concede that *Weyerhaeuser* disagreed with this extra-contractual "prong of the Second Circuit's decision in *Nereus*." (Resp. Br., at 4.)

must deal in reality, and must decide the many actual cases in which the contracts do not contain such provisions. The recurring nature of such disputes concerning consolidation is amply demonstrated by the substantial number of state and federal courts (many of which are listed in Alumina's petition) that have confronted the issue since the Second Circuit's 1975 decision in *Nereus*.

It is no answer to say, as respondents do, that it is tolerable for different interpretations of federal law regarding consolidation to prevail in different circuits because parties may choose between the circuits (and their different consolidation rules) when they agree to the venue of arbitration proceedings.[4] As this Court has

[4] Respondents assert that when Alumina entered into its contract with the general contractor in 1981 "the courts in New York . . . could consolidate the arbitrations." (Resp. Br., at 7.) The courts below did not rule on that question because it has no bearing on this case. In any event, in 1981, it was not at all certain that the holding of *Nereus*, involving consolidation of arbitrations among three parties *with* contractual privity, would be applied to parties (such as Alumina and the subcontractor) with no contractual privity. The district courts in the Second Circuit later split on the question of *Nereus*' validity, and this is the first case in which the Second Circuit has applied the *Nereus* rule broadly. The New York state court case chiefly relied upon by respondents, *County of Sullivan* v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72 (1977), was decided under state law, and thus had no relevance to Alumina's arbitration agreement, and the other state court decision cited by respondents pointedly noted the "lack of apposite case law" on the question whether consolidation could be ordered under the Federal Arbitration Act. *In re Vigo Steamship*, 26 N.Y.2d 157, 257 N.E.2d 624, 627, *cert. denied*, 400 U.S. 819 (1970).

Finally, we note that the American Arbitration Association found that there was an "absence of consent" by Alumina to consolidated arbitration proceedings (note 2, *supra*), and the courts below never determined that Alumina had "consented" to consolidation by agreeing to arbitrate disputes in New York. It was that lack of consent that prompted the district court's consideration of whether it had authority under the Federal Arbitration Act to order consolidation.

emphasized with respect to the applicability of the Federal Arbitration Act in the state courts, Congress did not intend "to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). The principle is all the more compelling with respect to the federal courts of appeals. This Court alone can ensure that Congress' goal of a nationally-uniform federal arbitration law is not frustrated through inter-circuit conflicts.[5]

4. Respondents say little about Alumina's contention that the courts below erred in ordering consolidation on efficiency-based grounds when the parties had never agreed to consolidation. It is not enough for respondents to assert that *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985), "do not address consolidation" (Resp. Br., at 7). It is the principle of those decisions that governs this case—namely, that the courts may not expand or constrict a party's contractual obligation to arbitrate disputes on the basis that this might promote judicial notions of efficiency. The courts below, like respondents, ignored that principle and in doing so, set themselves at odds with the decisions of this Court and of the other courts of appeals that have ruled upon the question.

---

[5] The advantages of a uniform federal arbitration statute were stressed in the hearings leading to the enactment of the Federal Arbitration Act. *See* Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646, 68th Cong., 1st Sess. 28 (1924) (Statement of Mr. Alexander Rose, representing the Arbitration Society of America).

CONCLUSION

For the reasons stated above and in Alumina's petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

A. RAYMOND RANDOLPH
(Counsel of Record)
DANIEL I. PRYWES
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100
Attorneys for Alumina Partners of Jamaica

September 1987